NTSB Order No.
EM-81

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 28th day of August 1980.

JOHN B. HAYES, Commandant, United States Coast Guard,

vs.

FRANKLIN D. PIERCE, Appellant.

Docket ME-78

OPINION AND ORDER

Appellant seeks reversal of the Commandant's decision affirming a probationary suspension of his license (No. 491561) for negligent pilotage of the SS RICE QUEEN.

Appellant had appealed to the Commandant (Appeal No. 2173) from the initial decision of Administrative Law Judge Charles J. Carroll, Jr., issued following a hearing on the negligence charge. [1] The Coast Guard investigating officer offered a stipulation of facts at the outset which had been agreed to by the appellant, his counsel, and the Coast Guard. That document was rejected by the law judge after an extended discussion on the record. The parties subsequently revised their stipulation and it was then accepted into evidence. In accordance with the facts recited therein, the law judge found that appellant, serving as pilot of the SS RICE QUEEN transiting eastbound in Suisun Bay, California, on December 19, 1977, gave timely orders for a turning maneuver into New York Slough, [2] which were not executed properly by the helmsman causing the vessel to deviate from its intended course further eastward in the Bay; that as appellant was backing the vessel on its anchor to be repositioned for the turn, the master recommended an order of full astern; and that appellant ordered the said maneuver, which

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[1] Copies of the decision of the Vice Commandant (acting by delegation) and the law judge are attached. 33 CFR 1.01-40.

[2] Appellant's license qualifies him, inter alia, to pilot vessels on San Francisco Bay and its tributaries to Stockton and Sacramento, California. Suisun Bay and New York Slough form sections of this inland waterway.

resulted in a collision with Suisun Bay Light 31. No additional facts or circumstances concerning the case of the collision were adduced.

The law judge held that the act of colliding with the navigation light "which is not ordinarily done by a vessel under control and properly managed. . . ", on a course directed by appellant, established a prima facie case of negligence on his part; and that the master's "possible fault" in recommending the course would not exonerate him from such culpability (I.D. 7-8). In the absence of any other evidence in rebuttal, the law judge found appellant negligent, as charged, in his operation of the SS RICE QUEEN. He there-upon entered an order suspending appellant's license for 3 months, to be remitted pending a 12-month period of probation.

Appellant, acting through new counsel on appeal, has filed a brief contending that he was deprived of a fair hearing by the law judge's rejection of the original stipulation and by findings made outside the record. He further contends that the law judge erroneously relied on a presumption of negligence. Counsel for the Commandant has filed a brief in opposition.[3]

Upon the consideration of the briefs and the entire record, we conclude that the findings are supported by reliable, probative, and substantial evidence. We adopt the findings of the law judge and those of the Commandant, on review, as our own. Moreover, we agree that the sanction is warranted.

In Admiralty law, a presumption of fault arises when a moving vessel collides with a fixed object,[4] which "suffices to make prima facie case of negligence against the moving vessel."[5] Appellant argues that this rule exists only for the vessel itself and has no validity in relation to the navigator. We disagree. Looking to the reason behind the rule, namely, that accidents of this kind "simply do not occur in the ordinary course of things unless the

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[3] After the filing of the Commandant's brief, another brief in reply thereto was submitted by appellant. It has been considered, although not provided for in the Board's rules of procedure. 49 CFR 825.20. Appellant's further request for oral argument is denied. 49 CFR 825.25.

[4] The light was found to be "15 feet above the water erected on a pile, in 34 feet of water. . . "(I.D. 5).

[5] Brown & Root Marine Operators, Inc. v. Zapata Off-Shore Co., 377 F. 2d 724, 726d (5th Cir. 1967).

vessel has been mismanaged in some way,"[6] we find it equally applicable to the licensed officer directing the vessel's navigation at the time. The courts have attributed such mismanagement to negligent navigation of the navigator in analogous situations where it was established that the moving vessel had struck an anchored vessel, bridge, shore structure, or other obstruction which was either visible or the location of which the navigator was charged without knowing.[7] While appellant has cited a contrary precedent where the pilot of a vessel striking a canal bank was not held presumptively at fault,[8] We choose to follow the prevailing rule.

Appellant also cites a decision of the Supreme Court holding that the mere fact of collision between a train and highway vehicle at a grade crossing "furnishes no basis for any inference as to whether the accident was caused by negligence of the railway company, or the traveler on the highway, or of both, or without fault of any one".[9] We see no direct relevance in that type of accident between moveable objects to the case before us, where the inference arises from the fact that an unmoveable object has been struck by a moveable one. Moreover, the quoted statement must be taken in the full context of the decision, which turned on the construction of a state statute creating a presumption of liability against the railroad company from the fact of injury caused by the running of its locomotives and cars. The statutory presumption was rejected because it had been given the effect of evidence to be weighed against testimony tending to prove that the operation of the train was not negligent in any respect. Yet the Court clearly

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[6] Patterson Oil Terminals v. The Port Covington, 109 F. Supp. 953, 954 (E.D. Pa. 1952), aff'd 208 F. 2d 694 (3d Cir. 1953).

[7] The Oregon, 158 U.S. 186, 15 S. Ct. 804, 39 L. Ed. 943 71894); Seaboard Airline R. Co. v. Pan American Petroleum & Transp. Co., 199 F. 2d 761 (5th Cir. 1952), cert. den. 3455 U.S. 909; Ford Motor Co. v. Bradley Transp. Co., 174 F. 2d 192 (4th Cir. 1949); The Severance, 152 F. 2d 946 (4th Cir. 1945), cert. den. 328 U.S. 853; Carr v. Hermosa Amusement Corp., 137 F.2d 983 (9th Cir. 1943); Sabine Towing & Transp. Corp., v. St. Joe Paper Co., 297 F. Supp. 748 (N.D. Fla. 1968).

[8] Victorias Milling Co. v. Panama Canal co., 272 F. 2d 716 (5th Cir. 1959); cf. Commandant v. Buffington, NTSB Order EM-57, adopted February 11, 1977, a vessel grounding case wherein we also held that the presumption of fault was inapplicable.

[9] Western A.R.R. v. Henderson, 279 U.S. 639, 643, 49 S. CT. 445, 447, 73 L. Ed. 884, 888 (1929).

distinguished and did not disturb an earlier decision upholding a similar statute of another state which was used only to supply an inference of the railroad's liability in the absence of other evidence contradicting such inference. Here, the presumption had no greater effect. It would not have survived a showing by appellant that he had exercised the degree of care and skill expected of a ship's pilot. Had he done so, the Coast Guard would have been required to go forward with evidence to sustain its burden of proof, and the case would have been decided on the evidence alone. We thus have no conflict with the Supreme Court's decision in terms of the application of rebuttable presumption. Appellant simply failed to meet the burden of rebuttal.In the waters for which he is licensed, the pilot "supersedes the master, for the time being, in the command and navigation of the ship...".[10] The fact that appellant followed the master's advice neither served as an excuse for the consequences of taking an action which may have led to the collision nor did it serve to relieve the pilot of his responsibility for the safe navigation of the ship.[11]

Finally, on this issue, appellant argues that use of the presumption should be tested according to the standard we have adopted in aviation cases. In accidents involving aircraft striking objects on the ground short of the runway during a landing approach, for example, we have held that the circumstances of the accident itself "coupled with evidence ruling out pilot error (e.g., a malfunction of an aircraft component or weather conditions). . . " can lead to the reasonable inference that the accident would not have occurred but for carelessness on the pilot's part.[12] Undoubtedly, the elimination of factors such as weather conditions or mechanical defects in the stipulation would give rise to a stronger presumption of negligence against appellant. But unlike the aviation cases, where we were writing on a clear slate,[13] it was not a necessary element of proof in this instance under the governing case law. Evidence of a moving vessel striking a fixed object shifted the burden of rebuttal immediately

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[10] The Oregon, supra, 158 U.S. 194

[11] The master of a vessel may relieve a pilot of responsibility for the safe navigation of a vessel, but there is no suggestion in the stipulation that he did so in this case.

[12] Administrator v. Davis and Manecke, 1 N.T.S.B. 1517, 1520 (1971).

[13] The doctrine was first ennunciated by our predecessor agency, the Civil Aeronautics Board, in Administrator v. Lindstam, 41 C.A.B. 841 (1964).

to appellant. He had ample opportunities to show that these or any other factors unconnected with his own error might have caused this accident both in the stipulations or in rebuttal, and failed to do so. Under these circumstances, we would regard causes other than pilot error to be ruled out by the absence of any such evidence in the record.

Turning to the remaining contentions, appellant argues that the law judge prevented him from putting exculpatory facts into the record by insisting on revisions of the original stipulation. He refers to clauses in which the words "reasonable and proper" were stricken in describing the maneuver of backing the vessel on its anchor, and the final maneuver of going full astern was changed from an action that "did not prevent the collision. . . " to one that "resulted in a collision. . . " of the vessel with the light (ALJ Exh. III). We find nothing in the record to support appellant's assertion with respect to the latter clause.[14] The reason given by the law judge for rejecting the proposed stipulation was that the Coast Guard would be stipulating away its case by agreeing that appellant "went full astern under the advice of the Master in making a proper backing maneuver" (Tr. 21). If the proposed stipulation had been accepted, it would make no difference in our view since we agree with the Commandant that appellant was not found negligent for attempting to correct the vessel's position by backing "but for striking Suisun Bay Light 31 during the process" (C.D. 5). Furthermore, the record shows plainly that the parties were under no compulsion to revise the stipulation but acted of their own free choice. A number of changes were made in addition to the one that concerned the law judge. Although this was done in an off-the-record discussion, appellant and his counsel initialed each of the changes and signed the revised document. No objection to it was made by appellant's counsel at the hearing, and our review of the record indicates that allegations of undue influence by the law judge, raised herein for the first time by appellant's new counsel, are totally unfounded.

Appellant cites three instances in making various findings of fact. On the record, he indicated that one of the factors considered on sanction was appellant's failure to "allow for the drift of the tide. . . " when the vessel was backing down (Tr. 24). Although it had been originally stipulated that an ebb tide from New York Slough caused the vessel to maneuver, this statement was among those deleted in the revised stipulation. Nevertheless, we consider it as having a de minimis effect on the assessment of

[14] In any event, a description of appellant's action as ineffectual rather than causative would make him no less responsible for the collision.

sanction since the law judge was principally influenced by appellant's failure to offer a satisfactory explanation for the vessel's collision. In his decision, the law judge also made extra-record findings in describing the SS RICE QUEEN and Suisun Bay Light 31. These details are to be found in official Coast Guard publications,[15] and their accuracy is unchallenged. The trier of fact in an administrative adjudicative proceeding may take official notice of facts commonly known or within the agency's special expertise without proof.[16] In our view, the descriptions given by the law judge are well within the permissible area of official notice.

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal be and it hereby is denied; and

2. The order of the law judge and the Commandant, suspending appellant's license No. 491561 for 3 months on 12 months' probation, be and they hereby are affirmed.

KING, Chairman, McADAMS, GOLDMAN and BURSLEY, Members of the Board, concurred in the above opinion and order. DRIVER, Vice Chairman, did not participate.

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[15] See Volume III, Light List, Pacific Coast and Pacific Islands, 1979, page 62; Merchant Vessels of the United States, 1978, page 1194.

[16] 4 Mezines, Stein, Gruff, Administrative Law, §. 25.01.